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United Nations Commission on International Trade Law
Thirty-fifth session

Summary record of the 752nd meeting
Held at Headquarters, New York, on Tuesday, 26 June 2002, at 3 p.m.

Chairman: Mr. Abascal Zamora (Chairman of the Committee of the Whole) ..... (Mexico)

Contents

Finalization and adoption of the draft UNCITRAL Model Law on International Commercial Conciliation (*continued*)

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02-44401 (E)

In the absence of Mr. Joko Smart (Sierra Leone), Mr. Abascal Zamora (Mexico), Chairman of the Committee of the Whole, took the Chair.

The meeting was called to order at 3.20 p.m.

Finalization and adoption of the draft UNCITRAL Model Law on International Commercial Conciliation (*continued*)

Finalization of the draft report
(A/CN.9/XXXV/CRP.1/Add.1-6 and Add.9)

Section II.B. Consideration of draft articles

1. **Mr. Morán Bovio** (Rapporteur) presented documents A/CN.9/XXXV/CRP.1/Add.1-6 and Add.9, the sections of the draft report concerning the discussion on the draft Model Law.

Consideration of draft articles 1-5
(A/CN.9/XXXV/CRP.1/Add.1)

2. **Mr. Kovar** (United States of America) said that paragraph 14, concerning the consideration of draft article 1, paragraph (8), should reflect the remarks that in some countries arbitrators were entitled to act as conciliators whereas in others they were not. He proposed inserting the following words, after the opening sentence: "It was noted that it would be useful for the Guide to include a reference to the fact that in some systems an arbitrator could, pursuant to agreement of the parties, become a conciliator and conduct a conciliation proceeding, but that this was not accepted practice in some other systems".

3. Although the issue of party autonomy had been stressed during the debate, it had not been mentioned in paragraph 19. It would be useful to amend the second sentence to read as follows: "A contrary view was that article 3 should be left as it was in order to preserve maximum party autonomy." The following sentence should subsequently begin: "A separate but related observation was that while parties could not agree to a higher standard of enforceability ...".

4. **Mr. Tang** Houzhi (China) said that during the discussions in the Working Group and the Commission, he had failed to understand why there was such resistance to agreements reached by the parties.

5. **Mr. Kovar** (United States of America) proposed to refer in paragraph 21 to the suggestion that countries considering the adoption of article X should be informed that parties should be entitled to protect their rights by court proceedings. The following sentence could be inserted immediately prior to the last sentence of paragraph 21: "It was also stated that States considering adoption of article X should be informed of the possibilities for parties to preserve their rights when article X had not been adopted, namely that a party could commence a national court proceeding or arbitration to protect its interests." He also suggested that the following words should be added to paragraph 25: "It was agreed that further clarification would be included in the guide to enactment and use."

Consideration of draft articles 6-9
(A/CN.9/XXXV/CRP.1/Add.2)

6. **Mr. Kovar** (United States of America) said that the current text failed to mention the decision to combine draft articles 5 and 6. He proposed to insert the following paragraph 13 (bis): "Following the discussion of articles 5 and 6, the Commission adopted a suggestion of the Secretariat to combine those articles in an article to be numbered article 5. The Commission referred to the drafting group the task of preparing that combined article and in so doing to reflect the discussion set forth above under the headings article 5 and article 6". Concerning paragraph 16, it was to be hoped that the misinterpretation referred to in the opening sentence would not arise, and therefore the word "easily" should be deleted. He proposed a series of amendments to paragraph 17, for it to read: "The widely prevailing view, however, was that paragraph (3) should be regarded as a basic obligation and a non-negotiable minimal standard to be observed mandatorily by any conciliator." That would be a stronger statement than the current version. Paragraph 29 was incomplete and potentially misleading, and the following words should be added to the end of the first sentence in order to reflect the debate more fully: "..., unless the party giving the information did so subject to a specific condition that it not be disclosed".

7. **Mr. Zanker** (Observer for Australia) said that it was inaccurate to state, in paragraph 28, that a radical concern had been expressed, since the concern had applied to a standard practice common to Australia, Singapore and the United Kingdom. He proposed to redraft the opening sentence as follows: "Certain countries expressed concern with respect to the policy on which draft article 9 was based."

8. **Ms. Moosa** (Singapore) said that paragraph 29 should be amended in accordance with the amendments made in the guide to enactment and use.

9. **Mr. Sekolec** (Secretary of the Commission) said that paragraph 29 would not be amended to reflect the Guide unless a specific proposal was made to that effect. The current text was an accurate reflection of a discussion that had taken place in the Working Group.

10. **Mr. Chan** (Singapore) said that the draft report should reflect the deliberations of the Commission during the session, and not only those of the Working Group. It was clear that many delegations did not support the current wording.

11. He proposed the following amendment to paragraph 29: In the first line of page 7, immediately after the word "conciliator", the existing text up to the word progress should be deleted and replaced by the following: "is not the practice in some countries, and this is reflected in article 10 of the UNCITRAL Conciliation Rules, but is the practice in some others." The document references in parentheses would remain.

12. **The Chairman** said that the change proposed by Singapore would be adopted.

Consideration of draft article 10. Duty of confidentiality (A/CN.9/XXXV/CRP.1/Add.3)

13. **Mr. Kovar** (United States of America) suggested that in paragraph 2, the words "assumed to be" should be inserted between the words "professional conciliators who were" and the words "well aware of issues". Thus, the phrase would read: "professional conciliators who were *assumed to be* well aware of issues".

14. In paragraph 7, the words "since they are superfluous, given the presence of article 3" should be inserted between the words "unless otherwise agreed" and "but after discussion". The following phrase should be added at the end of the same sentence: "in order to reinforce in this context the principle of party autonomy". The amended paragraph would read as follows: "Some support was expressed in favour of deleting the words 'Unless otherwise agreed', *since they are superfluous, given the presence of article 3*, but after discussion the prevailing view was that they should remain *in order to reinforce in this context the principle of party autonomy*."

15. **Mr. Tang** Houzhi (China) said that the United States proposal did not reflect the discussion. The present wording of paragraph 7 should be retained.

16. **The Chairman** said that both he and the Secretary believed that the United States amendment did reflect the decision that had been taken.

17. **Mr. Zanker** (Observer for Australia) said that he supported the text proposed by the United States.

Consideration of draft article 11. Admissibility of evidence in other proceedings (A/CN.9/XXXV/CRP.1/Add.4, paras. 1-10)

18. **The Chairman** noted that there were no comments on article 11.

Consideration of draft article 12. Termination of conciliation (A/CN.9/XXXV/CRP.1/Add.4, paras. 11-16)

19. **Mr. Kovar** (United States of America) said that the following sentence should be inserted before the last sentence of paragraph 14: "It was also pointed out that conciliation depends on both parties being willing participants and that it makes no sense to force an unwilling party to conciliate."

20. **Mr. Jacquet** (France) said that his delegation could not support the United States amendment. The Commission had consistently left aside everything relating to the question of the contract whereby the parties agreed to conciliate. The United States proposal might in some cases be interpreted as condoning violation of the conciliation contract.

21. **The Chairman** pointed out that the United States proposal did not reflect an agreement reached by the Commission but merely stated a position that had been brought up during the discussion.

22. **Mr. Jacquet** (France) stressed the importance of providing the full context of any point raised in the report. In the case at hand, the matter referred to by the United States delegation had come up in the context of a French proposal to take into account the obligation of the parties to conciliate when they had previously agreed on a conciliation clause. What the United States delegation was proposing would indirectly encroach upon the contractual obligation of the parties to conciliate. Every time his delegation had sought, in the debate, to introduce the matter of the conciliation contract, the objection had been raised that the contract

was beyond the scope of the Model Law. The same rule should be applied in every case.

23. **Mr. Zanker** (Observer for Australia) said that he supported the United States proposal, which reflected a very important part of the discussion. The amendment could not be construed as the Commission somehow sanctioning anyone intending in the future to breach a conciliation contract; it simply recognized the reality that contracts of any kind were regularly breached.

24. **Mr. Sekolec** (Secretary of the Commission) suggested that the sentence proposed by the United States might be slightly amended by inserting the words "the success of", so that the sentence would read as follows: "It was also pointed out that *the success of* conciliation proceedings depends on both parties being willing participants and that it makes no sense to force an unwilling party to conciliate." The last part of the sentence referred to practice, but was not a matter of law. One of the most important issues that had been raised with respect to the Model Law was the fact that it did not declare conciliation agreements to be binding. It had consistently been stressed that conciliation agreements might well be binding but that that issue was outside the scope of the Model Law.

25. **Mr. Jacquet** (France) said that he was willing to agree to the United States proposal provided that the Model Law did not give the impression that parties were encouraged to conciliate however they wished, whenever they wished or if they wished, when they had already decided, by means of a conciliation clause, that they should conciliate. He therefore suggested that the following sentence should be added after the sentence proposed by the United States: "It was pointed out that this comment had no implication whatsoever with regard to the possible failure of one of the parties to honour a contractual obligation to participate in conciliation."

26. **Mr. Kovar** (United States of America) pointed out that the wording proposed by the representative of France merely repeated what was said in the last sentence of paragraph 14.

27. **Mr. Sekolec** (Secretary of the Commission) said that the secretariat would find an appropriate wording to incorporate both ideas in the paragraph.

28. **Mr. Kovar** (United States of America) proposed a new paragraph 14 bis, which would read as follows:

> "It was suggested that while 'written' should be deleted as a general matter, a State adopting article X may wish to require that termination be in writing since precision is required in determining when the conciliation ends so that courts can properly determine the prescription period. In this context, it was noted that if writing is required for termination, it might also be required for commencement of the conciliation. It was requested that this be reflected in the Guide to Enactment and Use."

29. In addition, he pointed out that paragraph 16 did not reflect the fact that changes had been agreed to by the Committee of the Whole. He suggested that the sentence should be reworded to read as follows: "The Commission referred the substance of article 12, as adopted, to the drafting group."

Consideration of draft article 13. Conciliator acting as arbitrator (A/CN.9/XXXV/CRP.1/Add.5)

30. **Mr. Markus** (Observer for Switzerland) proposed that, after the third sentence of paragraph 2 of A/CN.9/XXXV/CRP.1/Add.5, in which the proviso "unless otherwise agreed" was said to be superfluous, the following sentence should be inserted: "In support of this view it was stated that the proviso could even be counterproductive, because it could give the wrong impression, namely, that there were two different degrees of party autonomy, a greater and a lesser one."

31. **Mr. Reyes** (Colombia) said that his delegation had earlier proposed changing the title to reflect the main thrust of the article, which was that a conciliator should not act as an arbitrator in respect of the same dispute. Although the change had been rejected, he would like to see the point reflected in the report and therefore proposed inserting the following sentence after paragraph 6 or paragraph 11: "The possibility was raised of changing the title of the article to reflect greater correlation and consistency with the article's content, which expressly refers to the ineligibility of the conciliator to act as an arbitrator. It was therefore proposed that the article should be entitled, 'Ineligibility of the conciliator to act as an arbitrator'."

32. **The Chairman** said that the report would have to add that the proposal had not been adopted.

33. **Mr. Chan** (Singapore) said that paragraph 9, on the debate concerning the appropriateness of a judge or arbitrator facilitating conciliation, was unbalanced

because it reflected the arguments against but not for the proposition. He recalled that the delegation of China had taken some pains to point out that the laws of a number of countries, including Singapore, expressly allowed an arbitrator to act as a conciliator in the same proceedings. In response, it was objected that the International Bar Association considered it unethical for an arbitrator to act as a conciliator. His delegation did not want the record to show that the balance of opinion considered such legal systems to be promoting illegal and unethical conduct. Given time, his and other interested delegations would come up with proposed new language with a better balance of the arguments pro and con.

The meeting was suspended at 4.55 p.m. and resumed at 5.20 p.m.

34. **Mr. Chan** (Singapore) said that in order to achieve a balance in the record, his delegation proposed that in paragraph 8 of A/CN.9/XXXV/CRP.1/Add.5, the first sentence should be amended and split in two, as follows: "In support of that suggestion, it was stated that the laws of a number of countries expressly provide for this. The draft Model Law should not ignore a practice that is accepted as a good practice in many countries". In paragraph 9, the last sentence should be deleted and replaced with, "It was also mentioned that in some countries such a situation is viewed as unethical".

35. He proposed deleting the whole of paragraph 11 and replacing it by the following text: "After discussion, as it was not possible to obtain a consensus, the Commission decided that the text proposed by the Working Group should not be interfered with. However, the matter should be discussed in the guide to enactment (see A/CN.9/506, para. 132)." That wording would, he believed, capture all the points made in the discussion while maintaining a balanced representation of the various views expressed on the issue.

36. **Mr. Kovar** (United States of America) welcomed that suggestion. However, for the sake of conformity with the language used elsewhere in the report, he would prefer the wording "the text proposed by the Working Group should be adopted".

Consideration of draft article 14. Resort to arbitral or judicial proceedings (A/CN.9/XXXV/CRP.1/Add.6)

37. **Ms. Brelier** (France) said that in the third sentence of paragraph 4 of A/CN.9/XXXV/CRP.1/Add.6, after the words "it was observed", the words "in response" should be added, because the sentence reflected a response to a previous suggestion and a shift in perspective.

38. **Mr. Kovar** (United States of America) said that paragraph 5, which reflected the discussion of objective and subjective grounds for a party to preserve its rights by going to court or arbitration despite a contractual obligation to conciliate, would reflect the tenor of the debate better with the following changes: "purely" should be deleted from the phrase "purely subjective criterion" in the first sentence; in the fourth sentence "subjective criterion" should be replaced by "ground"; and in the eighth sentence, "subjective" should be deleted from the phrase "subjective assessment". During the discussion no speaker, it seemed to his delegation, had said that grounds for a decision to preserve rights were purely subjective, even though they were in the sole discretion of a party.

39. In the debate, reflected in paragraph 6 of A/CN.9/XXXV/CRP.1/Add.6, that had culminated in the decision to combine the two paragraphs of the draft article on resort to arbitral or judicial proceedings, the point had been raised several times that the purpose of the change was to provide clarity. Therefore, in the second sentence of paragraph 6 his delegation proposed changing the phrase "to address that concern" to the phrase "to provide greater clarity".

40. The penultimate sentence of the paragraph presented in a very truncated manner the debate linking the subjective-objective question with the combination-of-paragraphs issue. His delegation felt that it did not adequately reflect the complexity of the debate and should be deleted. In the last sentence, where the words "in its opinion" were quoted, it would be well to indicate their source by adding "which are taken from article 16 of the UNCITRAL Conciliation Rules", in order to emphasize that the decision to change the phrase, "in its sole discretion", originally used in paragraph 2 of the draft article was influenced by a desire to align the Model Law with the Conciliation Rules. In the same sentence, "nevertheless" could be inserted after "Commission" to make the point that the Commission had adopted the suggestion to combine the paragraphs despite its doubts.

41. Since it had been decided to reflect some of the debate in the Guide, a new sentence should be added at the end of paragraph 6, as follows: "The Commission also noted that some additional clarification of the operation of this article should be provided in the Guide to Enactment and Use".

42. He also suggested inserting, at the end of the first sentence of paragraph 7 of A/CN.9/XXXV/CRP.1/Add.6, the words ", including action taken by a party to preserve its rights before expiration of a prescription period".

Adoption of the UNCITRAL Model Law on International Commercial Conciliation (A/CN.9/XXXV/CRP.1/Add.9)

43. **The Chairman** invited comments on the draft decision contained in A/CN.9/XXXV/CRP.1/Add.9.

44. **Mr. Kovar** (United States of America) proposed deleting the term "mediation", which appeared three times in the text of the draft decision (A/CN.9/XXXV/CRP.1/Add.9). It was undoubtedly useful to draw the reader's attention to the fact that conciliation embraced a wide range of mediation techniques and practices in different legal systems, but that would be more usefully achieved by inserting, after the first preambular paragraph, a new preambular paragraph as follows: "*And noting in this connection* that the expression 'conciliation' includes mediation and other processes of similar import".

45. **Ms. Brelier** (France) said the proposed addition would overload the text. She thought the text was sufficiently clear already on the various kinds of conciliation, and it would be enough just to delete the term "mediation" wherever it appeared in the draft decision.

46. **Mr. Sekolec** (Secretary of the Commission) suggested a separate preambular paragraph beginning: "*Noting in this connection* that conciliation means other ...". A separate paragraph would serve to detach the terminology from considerations of a political or commercial nature.

47. **Mr. Tang** Houzhi (China) said there seemed to be something missing in the third operative paragraph after "due consideration to". What were States being recommended to consider — adopting the Model Law, making reference to it when adopting national legislation, or something else?

48. **Mr. Sekolec** (Secretary of the Commission) suggested inserting, after "due consideration to", the words "enactment of the Model Law".

49. **Mr. Zanker** (Observer for Australia) endorsed that suggestion.

50. **Mr. Reyes** (Colombia) suggested a correction in the fifth line of paragraph 2 of the Spanish version of A/CN.9/XXXV/CRP.1/Add.9. Instead of "*para que la Secretaría lo complete*", the wording should be "*para ser completado por la Secretaría*", the comma after "internacional" being deleted.

51. **Mr. Mirzaee Yengejeh** (Islamic Republic of Iran) queried whether the draft decision should not be treated instead as a draft resolution for transmission to the General Assembly. If so, the term "decision" should be replaced by "resolution" and paragraph 2 should be amended by deleting the words "to be finalized by the Secretariat based on the deliberations of the Commission at that thirty-fifth session".

52. **Mr. Sekolec** (Secretary of the Commission) explained that the decisions of the Commission were adopted in a variety of different ways. Model Laws had often been adopted in the present format. However, the Commission's texts were not submitted directly to the General Assembly. That was the prerogative of the Sixth Committee of the Assembly, except in the case of treaties, which were proposed in draft form to the Assembly.

53. **Mr. Mirzaee Yengejeh** (Islamic Republic of Iran) asked whether the Commission, as a subsidiary body of the General Assembly, could address the Secretary-General or Member States directly.

54. **Mr. Sekolec** (Secretary of the Commission) said the Commission did address requests to the Secretary-General, occasionally by asking the Secretary-General to prepare a report for the General Assembly. The wording used in the present draft decision was closely modelled on previous decisions on model laws, in particular the Model Law on Electronic Commerce and the Model Law on Electronic Signatures.

55. *Documents A/CN.9/XXXV/CRP.1/Add.1-6 and Add.9, as amended, were adopted.*

56. **Mr. Kovar** (United States of America), on behalf of the members of the Commission, congratulated the acting Chairman on his successful endeavours to bring the draft Model Law to completion, within an exceptionally short time.

The meeting rose at 6 p.m.